JAMES JEMUT MASING

v.

FIONA FRANCES MASING (F) nee HENDERSON

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[DIVORCE PETITION NO. KG 49 OF 1991]
3 FEBRUARY 1994

FAMILY LAW: Properties jointly purchased - Properties purchased prior to marriage or after separation - Contribution by wife either directly or indirectly - How to apportion - Section 76 Law Reform (Marriage and Divorce) Act 1976.

The petitioner and respondent got married on 10 December 1977. They have two children. In or about January 1988, the wife left with the two children and except for a spell of 5 weeks in August/September 1989 when the wife returned with the two children the parties have been living apart. On 10 February 1989 they entered into a separation agreement in Auckland, New Zealand.

The wife claimed *inter alia* for lump settlement of NZ$160,000 and also half share in the husbands assets acquired during the marriage.

Held:

[1] Having regard to the contribution made by the wife in looking after the welfare of the family and in supervising the construction before leaving for New Zealand and in looking after the children in New Zealand, an award of 40% of RM115,000 to the wife is fair and reasonable. This works out to be RM46,000.

[2] With regard to the land in Siniawan the only contribution, if at all, of the wife would be the "looking after" of the children. But then the circumstances under which the custody and care of the children were given to the wife are not made known to the Court e.g. whether these were thrust upon the wife or there had been a tussle on the issue between the parties resulting in custody and care being given to the wife. These are relevant considerations. In the circumstances, the factor relating to the extent of the wife's contribution to the welfare of the family by looking after the children necessarily loses considerable strength.

[Wife's claim partly allowed].

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 76(1), (2), (3), (4), (5)

For the petitoner - Ernest Chua; M/s. Ernest Chua & Co.
For the respondent - Albert Tang; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Chong Siew Fai J:
The husband (petitioner) petitions for:

(1) dissolution of the marriage between him and his wife (respondent);
(2) care custody and control of the 2 children of the marriage, Anna Sulan Masing and Rachel Lian Masing, be given to the wife with reasonable access to himself;
(3) a sum of NZ$1,000 per month be paid to the wife being maintenance for herself and the said 2 children "until the said children reach the age of twenty-one or complete their educational training whichever is the earlier."

In her Answer, the wife also claims for reliefs 1 and 2 above i.e. dissolution of the marriage and custody of the 2 children. As for maintenance, she asks for NZ$1,200 per month (i.e. NZ$200 more) with liberty to vary and for the sum to be provided until the 2 children reach the age of 21 or they complete their educational training whichever is the **later**.

She further asks:

(a) that the husband provides a lump sum investment of NZ$30,000 to be held in trust for the said 2 children's tertiary education and also to provide "adequate" medical insurance cover for the 2 children and herself;
(b) further or alternatively, that the husband pays her a lump sum settlement of NZ$160,000;
(c) further or alternatively, that she be given at least $^1/_2$ of the husband's assets acquired during the marriage;
(d) that she be at liberty to apply for such other reliefs as circumstances may require.

In the course of this trial, both parties agreed to the divorce, the custody and the maintenance of the children. Accordingly, the following order was made:

(1) decree *nisi* granted;
(2) the care custody and control of the 2 children given to the wife with reasonable access to the husband including the bringing of the 2 children to Sarawak once a year by and at the

sole expense of the husband for a period not exceeding 3 weeks during the school holidays of the school or schools in New Zealand in which the 2 children are or will be studying;

(3) the husband do pay the wife by telegraphic transfer a sum of NZ$1,200 per month commencing from 1 June 1992 being maintenance to be apportioned as follows:

(i) NZ$100 to the wife until she remarries; and

(ii) NZ$550 to each of the said 2 children until she attains the age of 21 years;

payable on or before the last working day of each month, the first payment to be made on or before 30 June 1992.

There be liberty to apply.

There remains for consideration reliefs (a), (b), (c) and (d) stated above.

Relationship of the parties

The parties got to know each other in Wellington, New Zealand in 1974 when the husband was doing his B.A. degree in education and the wife was then a student nurse.

In 1975 the husband obtained his B.A. degree and returned to Kapit to teach for one year during which the wife visited Kapit for about 1 month at the end of 1976.

Subsequently the husband obtained Australian scholarships to do a Masters degree and later Ph.D. in anthropology in Canberra. While in Australia, he flew to Wellington to get engaged with the wife in July or August 1977 and subsequently again flew there to get married on 10 December 1977. It was not disputed that on both occasions the wife paid for the husband's air fares to and from Wellington, and that she also paid for the air fare of the husband's brother Kuching/Wellington/Kuching for their wedding.

After the marriage, the parties lived in Canberra: the husband continued his studies while the wife worked part-time as a nurse. The wife said she considered herself leaving home and brought her savings with her. They lived in Canberra from December 1977 to May 1978.

After obtaining the Masters degree, the parties returned to Sarawak about the middle of 1978 where the husband did field work for one year in Kapit for his Ph.D. They stayed in the husband's longhouse at Nangka Majau which was about 3 hours' journey by long boat from Kapit town.

After the one-year field work, the parties went again to Canberra where the husband continued with his Ph.D. studies, and the wife worked as a part-time nurse earning about A$300 to $400 a week.

After completing the Ph.D., the husband and his wife returned to Sarawak about September 1981. About 2 weeks later, the husband was employed by the Sarawak Electricity Supply Corporation (SESCO) where he worked till November 1983 when he resigned and became a politician. He was elected and has since been a State Assemblyman for the constituency of Baleh.

From March 1988 to September 1991, he was a political secretary to certain Ministries. He resigned as such on 29 September 1991.

The parties have 2 children:

(1) Anna Sulan Masing (f) born on 3 August 1981;

(2) Rachel Lian Masing (f) born on 19 December 1983.

In or about January 1988, the wife left with the 2 children and, except for a spell of 5 weeks in August/September 1989 when the wife returned with the 2 children, the parties have been living apart. On 10 February 1989 they entered into a separation agreement in Auckland, New Zealand.

Assets

On evidence, the assets owned by the husband are:

(a) The following landed property, the values of which were, by agreement, assessed by a qualified valuer, C.H. Williams, Talhar, Wong & Yeo Sdn. Bhd. whose valuations were binding on the parties:

(i) a semi-detached house (Lot 3374), 64, Taman Progress, Jalan Stampin, Kuching, with an area of 0.11 acre, valued at RM175,000. There is evidence that the furniture and household articles came to about RM8,300;

(ii) a piece of Native Customary Rights land known as Lot 42 Block 14 Menuan Land District, Kapit (described in evidence as Lot 21). The assessed value is RM31,000;

(iii) $^1/_2$ undivided share of a piece of native customary land (untitled) at 27th Mile, Kuching/Serian Road, Kuching. The value of this land was assessed to be RM3,000 for $^1/_2$ share;

(iv) 1/2 undivided share of a piece of land at Siniawan and described as Bau Lease of Crown Land No. 3290, valued at RM9,500;

The wife agreed that apart from the house at Taman Progress, she did not do any supervisory works to improve any of the other lands.

(b) The following shares in companies or partnership:

(i) 30,000 shares in Digicon Sdn. Bhd. By agreement, they are valued at RM30,000;
(ii) 2,533.31 shares in Amanah Saham Nasional;
(iii) 33 shares in Choice Property Sdn. Bhd;
(iv) 25 shares in Livestock and Husbandry Sdn. Bhd.
(v) 34 shares in Rural Development Consultancy Sdn. Bhd.

By agreement, the shares in items (iii), (iv) and (v) above are valued at RM1 each totalling RM92.

The wife admitted that she did not make any financial contribution in the acquisition of any of the above shares, and that apart from Digicon Sdn. Bhd., she did not take part in setting up any of the offices.

Vehicles

A Pajero car bearing registration No. QKA 722.

Law on division of assets

For the division of properties acquired during the marriage, the law divides them into 2 categories:

(1) assets acquired by the couple by their joint efforts;
(2) assets acquired by the sole effort of one party to the marriage.

For category (1) i.e. assets acquired by joint efforts of the couple, the Court shall lean towards equality of division subject, however, to the following factors for consideration:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
(b) any debts owing by either party which were contracted for their joint benefit;
(c) the needs of the minor children of the marriage.

For category (2) i.e. assets acquired by the sole effort of one party to the marriage, the Court may divide the assets in such proportions as it thinks reasonable, regard to be had to the following considerations:

(a) the extent of the contributions made by the other party who did not acquire the assets, to the welfare of the family by looking after the home and caring for the family;
(b) the needs of the minor children of the marriage.

Provided, however, that in any case the party by whose effort the assets were acquired shall receive a greater proportion.

The Court may, instead of dividing the assets, order the sale of such assets and the division of the proceeds of sale between the parties. (See s. 76(1)(2)(3 and (4) of the Law Reform (Marriage And Divorce) Act 1976).

It has been agreed that whatever proportions of the assets as may be to be for the wife as a result of the division, they shall be converted into monetary sums to be paid by the husband.

Wife's contribution to welfare of family and home

There is evidence, which I accept, that while in Canberra immediately after the marriage, the wife spent about A$2,000 to furnish the flat for the parties.

During the one year in the longhouse, Kapit, when the husband did his field work (1978/1979), the wife travelled with him and adjusted herself to the local conditions well. It is not unreasonable to recognise that coming from a more affluent society, the wife, for the sake of the husband, had to put up with certain inconvenience. There is evidence from both parties that the wife helped in getting food and fish, cooked for the family and did household work at the longhouse.

In the course of the husband preparing his thesis, the wife assisted in reading drafts, improving the English and typing. This was acknowledged by the husband in his work.

The husband also admitted the possibility of the wife spending part of her earnings from the part-time nursing job for the family. In this connection the wife's evidence, which I accept, is that with her earnings, she spent about A$300 a month for about 21 months for household expenses and buying groceries. She also assisted him in the latter's activities when he was a student-leader for 1 year in Canberra.

The wife also said with her earnings she sent A$60 per month to the husband's mother for about 25 months. Under cross-examination, the husband admitted this as possible. I accept the wife's evidence in this regard as the truth.

There is also evidence from the wife that she paid for the air fare of the husband's mother to visit Australia and also for a trip to the southern states, totalling about A$2,200. In this regard, the husband under cross-examination said that the wife contributed to the trip. While the husband said they had also taken his mother to Queensland, the wife said that the mother was not in the Queensland trip as she had then returned to Sarawak. I am inclined to believe the wife whose evidence is more specific and convincing.

The 2nd daughter was born in December 1983 in Auckland, New Zealand. According to the wife, she returned from Sarawak to New Zealand for the child's birth. She paid for the fares of herself and her 1st daughter and stayed in New Zealand for 4 months and paid the living expenses. It is not disputed that after the Council Negri election in late 1983 or early 1984, the husband went to New Zealand and returned to Sarawak with the wife, their first and the newly-born 2nd children. The husband conceded that some of the expenses for the birth of the 2nd child might have been paid by the wife or her family, but denied that the air fares for the family were paid by the wife. In the face of the oral contradictions, I find it difficult to come to any reasonably safe conclusion as to who paid the air fares or if they were not paid by both. But one thing is clear: both parties must have consented to the 2nd child being born in New Zealand and toward this goal, the wife had made certain financial contribution.

The wife said upon their return to Sarawak after the husband had completed his Ph.D., she spent some of her savings in purchasing household articles for their flat provided by SESCO. The husband, however, denied this. But he admitted that the wife performed household duties, shopping and looking after the child with the assistance of a servant. It was the same for the wife after the husband entered into politics. There were then 2 children. The wife also assisted in transporting and bringing the husband's political supporters to and from the airport and for businesses. The supporters also used to stay in the parties' house.

In 1981 i.e. the year following their return after the husband completed his Ph.D., the family bought a second car costing between RM3,000 to RM4,000. Respecting the payment for this car, I am inclined to accept the wife's evidence as the truth. The evidence of the husband in this respect wavers. Under cross-examination he, at first, said he paid for the car. When pressed further, he replied he did not know and was not sure if the wife had paid RM2,000, adding that the wife was not earning and thus how could she pay. The wife, on the other hand, maintained that she put in RM2,000 in the spirit of the family and that her sum was sent from New Zealand. The wife also said the car was subsequently given to the petitioner's brother and her contribution of RM2,000 was never paid back to her. I find the wife's evidence more convincing.

Since the parties' living apart in January 1988, the 2 children, as the husband conceded, have been under the good care of the wife and have performed well in school.

Semi-detached house

As regards the semi-detached house, the husband said he bought the land in the middle of 1986 for RM58,309 on which he built a house and moved into it on 30 August 1988. I have no reason to doubt the value of the land as stated. The valuer's valuation of the land in July 1992 (some 6 years later) was RM85,215.

For the wife, Counsel submitted that the land was bought through the joint effort of the wife and the husband. With respect, I am unable to accept this. Both subsections (1) and (3) of s. 76 of the Act use the phrase "assets acquired". In our present case, the land was acquired in mid-1986 and there is no evidence that any part of the purchase price came from the wife or from the joint account of the parties. The fact that she had previously contributed to the setting up of the matrimonial home in Canberra and spent money on the air fares of the husband and his relatives for their engagement, wedding and holiday trip, though strongly persuasive demonstration of the wife's affection and concern for the husband, has no bearing on the purchase of the land in Taman Progress, Kuching. I hold that the land was acquired by the sole effort of the husband and division thereof is governed by s. 76(4) of the Act.

The wife said that she participated in the planning and construction of the house on the land, discussing with the architect, selecting tiles, observing the building operations and was every day at the construction site. She estimated that by the time she left Sarawak, the house was 90% completed. The husband, however, said that when the wife left in January 1988, the house was about 75% completed. Whatever might be the exact percentage of completion by the time of the wife's departure, I am inclined to believe that she had, in her own way, been actively involved in the construction. I accept as the truth that during the marriage, the wife had substantially contributed to the welfare of the family and the children while in Sarawak and, subsequently, solely looked after the children and their education while in New Zealand. As conceded by the husband, he was entirely satisfied with the manner the 2 children were being looked after.

The evidence of the husband is that the house was built at RM103,800. Add this to the costs of purchasing the land at RM58,309, the total was RM162,109. He said he took a loan of RM120,000 from a bank for the purpose. This loan was supported by the valuation report (Exh. VR2) at page 5, showing that the charge was registered in June 1987. However, in the valuation report, there is another loan of RM20,000 taken in or about September 1990. Learned Counsel for the wife submitted that since there was no evidence from the husband as to how much of the loan had been repaid, it should be presumed that the loan had been substantially settled or that the petitioner was in a position to repay in full. In my opinion, the second loan of RM20,000 should not be taken into account in assessing the value of the semi-detached house for the purpose of s. 76(4) of the Act. It was never raised in the husband's testimony. More importantly, it was taken in or about September 1990 - some 2 years after the husband had moved into the house in August 1988. On the evidence available, I am unable to accept that this has anything to do with the construction of the house.

As regards the presumption suggested by Counsel for the wife that the husband is in a position to repay the loan in full, I do not think the ability, even if it is true, has any relevancy in considering the distribution under s. 76(4) of the Act. If the loan is unpaid, it is a liability that has to be taken into account in assessing the actual worth of the property.

I am also not prepared to draw the presumption, as suggested on behalf of the wife, that the loan had been substantially repaid. This is not a case where a party withholds or suppresses evidence. The husband had testified in Court that he took a loan of RM120,000. True, in his examination-in-chief, he did not disclose how much of the loan still remained unpaid; but neither was he questioned on it during cross-examination on behalf of the wife. This is a case where opportunity was afforded to both parties to elicit the information, but both sides had omitted or had, for reasons unknown, thought it fit not to dwell upon it. In the circumstance, I am not prepared to presume that the loan had been substantially reduced as suggested by learned Counsel for the wife, nor that the loan had exceeded RM120,000 as seemingly suggested on behalf of the husband.

On the other hand, it would not be right to hold that nothing at all has been repaid. In the given situation, I would arbitrarily regard that RM60,000 still remains outstanding and payable. It may not be factually right. But given the circumstances, it would not be unfair to do.

The assessed value of the land and the house thereon is RM175,000. I would accept the valuation despite the husband's testimony of the value of RM162,109. After deducting the outstanding loan of RM60,000, there remains a sum of RM115,000. Under s. 76(4) of the Act, the party by whose effort the asset was acquired will receive a greater proportion. Having regard to the contribution made by the wife in looking after the welfare of the family and in supervising the construction before leaving for New Zealand and in looking after the children in New Zealand, I consider an award of 40% of RM115,000 to the wife fair and reasonable. This works out to be RM46,000.

Household articles

There is evidence of the following items in the house at Taman Progress and their approximate values:

(i)	Furniture	RM3,000
(ii)	Video and Television	RM1,300
(iii)	Stove	RM 700
(iv)	Washing machine	RM 500
(v)	Refrigerator	RM1,500
(vi)	Vacuum cleaner	RM 500
(vii)	Piano	RM 500
		RM8,000

(viii) Miscellaneous items respecting which evidence of the estimated value varies. According to the husband, they were worth RM300 but the wife said they were worth about RM2,000. I would take them to be RM1,000.

The total worth of the household articles would, for the purpose of division, be reckoned at RM9,000.

Considering that there is in evidence that, except for a few e.g. the piano, most of the items were bought by the husband, I would award the wife 40% of the total value of RM9,000 i.e. RM3,600.

Land in Kapit

It is not in dispute that $^1/_2$ undivided share of the native land Lot 42 Block 14 Menuan Land District in Kapit though registered in the husband's name was bought by the wife with her own money in 1978. The value of the whole land is RM31,000. It is only right that the wife should get RM15,500 being value of the $^1/_2$ share as conceded by Counsel for the husband.

As regards the other $^1/_2$ undivided share, this was bought by the husband in 1970 i.e. before the marriage. Section 76(3) of the Law Reform (Marriage And Divorce) Act 1976 has no application. Nor has s. 76(5) thereof since there is no evidence of any improvement made on the land by the wife or by joint efforts of the parties.

The award therefore is RM15,500 to the wife being $^1/_2$ the value of the Kapit Land.

Land at 27th Mile Kuching/Serian Road ($^1/_2$ share)

The husband has $^1/_2$ undivided share in a piece of native customary land (without document of title) comprising about 6 acres at 27th Mile Kuching/Serian Road. There is no evidence as to when the husband acquired the $^1/_2$ undivided share. According to the valuation report Exh. VR2, the market value in July 1992 for $^1/_2$ undivided share was RM3,000. For this $^1/_2$ undivided share, s. 76(3) and (4) of the Law Reform (Marriage And Divorce) Act 1976, in my opinion, applies, the property having been acquired by the sole effort of the husband. On the meagre evidence, and doing the best I can, I consider a sum of RM1,000 fair and reasonable having regard to her contribution to the welfare of the family by looking after the family.

Land in Siniawan ($^1/_2$ share)

The husband owns $^1/_2$ undivided share in another piece of land described as Bau Lease of Crown Land No. 3290 containing 1.542 hectares. The land valuer valued the share at RM9,500. Again the law to apply is, in my view, s. 76(3) and (4) of the said 1976 Act, the property having been bought by the sole effort of the husband. The uncontroverted evidence from the husband is that this property was acquired as late as March or April 1992. The wife had left for New Zealand with the children in early 1988 and the parties had separated by mutual agreement in February 1989. The only contribution, if at all, of the wife would be the "looking after" of the children. But then the circumstances under which the custody and care of the children were given to the wife are not made known to the Court e.g. whether these were thrust upon the wife or there had been a tussle on the issue between the parties resulting in custody and care being given to the wife. These are relevant considerations. In the circumstances, the factor relating to the extent of the wife's contribution to the welfare of the family by looking after the children necessarily loses considerable strength. I would award her RM1,500 as her share.

Investment in Amanah Saham Bumiputra

There is evidence of investment of money in Amanah Saham Nasional (ASN). This began while the parties were living together. Though in April 1988 the husband's investment was RM53,379.62, there is evidence from him that upon maturity at the end of 1990, the fund stood at about RM7,000, which was transferred to Amanah Saham Bumiputra (ASB) and that by the time of his giving evidence in this Court (21 May 1992), the amount stood at RM15,000. Whatever might have been the state of investment in the past, only this amount of RM15,000 is, in my opinion, relevant for our purpose, there being no evidence as to what had actually happened to the larger sum of money representing the earlier investment. The question is: Was this investment through the joint efforts of the parties? My finding is that it was. As admitted by the husband, the investment belonged to both of them. Also in her evidence, the wife said that she and her husband operated a joint cheque account, that purchases for the household were paid from it and that money saved was placed in the ASN which yielded better interest.

There is evidence from the husband that in 1989 or 1990 he gave the wife RM10,000 out of the ASN account. But in my opinion, the evidence is far from being sufficient to reasonably conclude on balance of probabilities that the wife could by virtue of that be said to have had her interest in the investment severed since on the husband's own evidence, he gave the wife the sum RM10,000 as a gift.

In my opinion, the sum RM15,000 as it stood in ASB is the balance of the investment through the joint efforts of the parties. Giving consideration to the factors in s. 76(2) of the Law Reform (Marriage And Divorce) Act 1976, the wife is entitled to RM7,500 being $^1/_2$ of the sum of RM15,000.

Shares

As regards the shares, the husband said that the 30,000 shares in Digicon Malaysia Sdn. Bhd. were given to him in early 1984 in order that the company might qualify as a Malaysian resident company.

While agreeing that she made no financial contribution to the formation of the company (and, for that matter, to any of the other companies), the wife said she had assisted in setting up the office of the company. I believe her on this. Value of the 30,000 shares has been agreed at RM30,000. I would award the wife RM12,000 being 40% of the agreed value.

As regards the 92 shares in the various other 3 companies, the husband said they were bought between 1984 and 1986, all at RM1 per share. I would award RM33 being approximately 35% of the agreed value RM92 to the wife.

The wife has abandoned claim on the Balman Domestic Agencies.

Pajero car

The husband said that the Pajero car was bought as a reconditioned car for RM61,000 in November 1991 when he traded in his Rocky jeep for RM33,000 and paid the balance RM28,000 by taking a loan from a friend. There was some challenge of the loan during cross-examination. However, having observed the husband and despite the lack of supporting document, I tend to accept his version as being true.

On the wife's own admission, she did not contribute any money to the purchase of the Rocky jeep. Also, since she had left for New Zealand in 1988 while the Pajero was acquired only in November 1991, it could not have been bought by joint efforts of the parties (s. 76(1)). Furthermore, since the parties had entered into a separation agreement in February 1989, the same consideration I have expressed relating to the $^1/_2$ share of the land in Bau applies. I would award 15% of the nett value of the Pajero (RM33,000) to the wife i.e. RM4,950).

Proceeds of sale of RX car

For the wife it was contended that she ought to be given RM10,200 being 60% of RM17,000 alleged to be the proceeds of the sale of the RX car. The evidence is rather unsatisfactory. The wife said that the car was bought for RM17,000 of which she contributed RM10,000. Subsequently the car was sold and she got back her RM10,000 in 1989 when she came to Sarawak. The husband merely said that he bought 'a' car in 1987 and the wife chipped in RM10,000. There is no evidence when and for how much the car was sold though it would appear to have been sold before the wife came to Kuching in August or September 1989. The wife was refunded RM10,000 and it is not clear how the balance (amount unknown) was disposed of. In the circumstance, I do not consider it fair to make any award under this head.

To sum up, the awards to the wife in monetary terms representing her entitlement in the following assets are:

(1) Semi-detached house at 64, Taman Progress, Jalan Stampin, Kuching	RM46,000
(2) Household items in the above house	3,600
(3) $^1/_2$ undivided share of the land in Kapit	15,500
(4) $^1/_2$ undivided share of the land at 27th Mile Kuching/Serian Road, Kuching	1,000
(5) $^1/_2$ undivided share of the Bau Lease of Crown Land No. 3290	1,500
(6) Investment in Amanah Saham Bumiputra	7,500
(7) 3,000 shares in Digicon Malaysia Sdn. Bhd.	12,000
(8) The aggregate 92 shares in the 3 companies: Choice Property Sdn. Bhd. (33 shares), Livestock And Husbandry Sdn Bhd. (25 shares) and Rural Development Consultancy Sdn. Bhd. (34 shares)	33
(9) Pajero car	4,950
	RM92,083

Other relief

As regards the wife's claim for the creation of an investment trust fund of NZ$30,000 for the benefit of the children, I am not prepared to grant it. The husband has not been proven to be a man of such substantial means as may fairly be saddled with such a burden. Furthermore, maintenance has already been awarded to the children by consent. For the same reasons, there shall be no order of a lump sum settlement of NZ$160,000 against the husband as prayed.

I am also not prepared to accede to the suggestion made on behalf of the wife that the costs of valuations conducted by the valuer be solely paid by the husband. The wife did not independently adduce any evidence on the values of the landed property. The valuation reports were for the benefit of both parties. It is only fair that the costs involved be equally borne and paid by the parties as previously agreed.

Costs

As regards costs of the action, the wife fails in her claim for the creation of an investment fund and a lump sum payment. Although she subtantially succeeds in the claim on the division of assets, considerable time was wasted in the trial by reason of the submission on her behalf that was not supported by evidence. In all the circumstances and in the exercise of the discretion of the Court, I order that the husband pays $^1/_2$ of the costs of the action to the wife. In the absence of an agreement, such costs are to be taxed.

Conclusion

There shall be judgment that the petitioner/husband do pay the respondent/wife the sum of RM92,083 representing the latter's share of the matrimonial assets and do pay the respondent/wife $^1/_2$ of the costs of this suit. In the absence of an agreement, such costs are to be taxed.

KERAJAAN MALAYSIA

v.

GAN CHUAN LIAN @ GAN PUAY CHEE

HIGH COURT, MELAKA
DATO' HAJI ARIFIN BIN HAJI JAKA JC
[CIVIL SUIT NO. 21-13 OF 1991]
10 MARCH 1994

REVENUE LAW: Recovery of taxes - Application by Government for summary judgement - Whether defendant entitled to plead defence of set-off - Government Proceedings Act 1976, s. 42(2)(e) - Rules of the High Court 1980, O.18 r.17 & O.73 r.4(1).

This was an application by the plaintiff for summary judgement against the defendant for RM1,109,861.86 being cumulative tax due and unpaid on six notices of assessment issued to the latter for years of assessment 1976-1981. The defendant, while not challenging the quantum claimed, contended that he was entitled to a set-off of RM570,224.23 being surplus payment he had previously made in respect of years of assessment 1966-1973. The amount due for the years of assessment 1966-1973 was the subject matter of a seperate suit which was still pending at the time of the hearing of this case.

Issue: Whether in a proceeding by the Government for repayment of taxes the defence of set-off is available to the defendant.

Held:

[1] It is settled that in an application under O. 14 the Court may give leave to defend if the defendant can demonstrate that there is a triable issue by way of abatement or set-off. However by virtue of s. 42(2)(e) of the the Government Proceedings Act 1976 and by virtue further of the provision of O. 73 r. 4(1) of the Rules of the High Court 1980, the defence of set-off is not available in this case.

[Application for summary judgement allowed].

Cases referred to:

Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276 ***(refd)***

Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 ***(refd)***

Hanak v. Green [1958] 2 QB 9 ***(cit)***